

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 23 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|------------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | 2 CA-CR 2008-0347 |
| |) | DEPARTMENT A |
| Appellee, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| ANGELICA MELISSA LEON, |) | the Supreme Court |
| |) | |
| Appellant. |) | |
| _____ |) | |

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200700735

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann

Tucson
Attorneys for Appellee

John William Lovell

Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Angelica Leon was convicted of one count of possession of a dangerous drug for sale. The trial court sentenced her to a presumptive term of ten years' imprisonment. On appeal, Leon argues the trial court erred in denying

her motion to suppress evidence obtained from a search pursuant to a warrant. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In reviewing a trial court’s ruling on a motion to suppress, we consider only the evidence presented at the suppression hearing, which we view in the light most favorable to sustaining the ruling. *State v. Gay*, 214 Ariz. 214, ¶4, 150 P.3d 787, 790 (App. 2007). In 2007, sheriff’s deputies arrested Luis Ramirez for his role in several burglaries. The officers informed Ramirez of the charges he faced and told him that he could potentially reduce those charges if he provided evidence of other criminal activity he knew about.

¶3 Ramirez informed the officers that he had recently gone to a local apartment where he traded stolen jewelry for illegal drugs from Melissa Leon. He also provided officers with the apartment’s address and drove by the apartment to confirm its location. The officers verified that Leon lived in the apartment and showed Ramirez her photograph. Ramirez confirmed that Leon was the person who had given him drugs in exchange for jewelry.

¶4 Relying on Ramirez’s information, the officers obtained a search warrant for Leon’s apartment. Officers also obtained Leon’s consent to search her mother’s car, as well as her wallet, where they discovered the drugs that form the basis for this charge.¹

¹Although Leon is challenging the search warrant for her apartment, the drugs that are the basis of Leon’s charges were found in her wallet and her mother’s car—both of which she gave officers permission to search. The parties do not argue whether Leon’s consent to search her mother’s car was sufficiently connected with or attenuated from the

Leon was subsequently charged with possession of a dangerous drug for sale. Before trial, she challenged the search warrant for her apartment, claiming it was invalid because it lacked sufficient indicia of Ramirez’s reliability as an informant. The trial court denied Leon’s motion, and she appeals from that ruling.

Discussion

¶5 Leon argues the trial court erred in denying her motion to suppress, claiming primarily that the search warrant for her apartment lacked probable cause because information showing Ramirez to be an unreliable informant “was omitted from the search warrant affidavit.” But Leon did not make this argument in her motion to suppress below. Instead, she contended the warrant was invalid because it was not supported by a sufficient level of reliability. Because Leon did not make the omitted-information argument below, she has forfeited her right to seek relief on that ground on appeal absent fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶19-20, 115 P.3d 601, 607 (2005). And, because Leon does not argue on appeal that the error was fundamental and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal if not argued); *State v. Fernandez*,

search of her apartment to make any evidence seized from the car subject to suppression. *See, e.g., State v. Guillen*, 573 Ariz. Adv. Rep. 11, ¶¶15-18 (Jan. 15, 2010); *State v. Monge*, 173 Ariz. 279, 281, 842 P.2d 1292, 1294 (1992) (even when consent to search voluntary, evidence found as result of search must nonetheless be suppressed if prior unconstitutional conduct “not sufficiently attenuated from subsequent seizure”). Because we decide this case on the ground raised by Leon, we need not address this issue.

216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it).

¶6 Leon also argues at least minimally that the trial court erred in denying her motion to suppress because the warrant affidavit lacked sufficient information to allow the issuing magistrate to conclude Ramirez’s information was reliable. We review the trial court’s denial of a motion to suppress for an abuse of discretion. *State v. Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008).

¶7 The Fourth Amendment to the United States Constitution requires a showing of probable cause before a search warrant may issue. U.S. Const. amend. IV; *see also* A.R.S. § 13-3913 (“No search warrant shall be issued except on probable cause, supported by affidavit . . .”). In *Illinois v. Gates*, 462 U.S. 213, 238 (1983), the United States Supreme Court established a totality-of-the-circumstances test to determine whether an informant’s tip establishes probable cause. *See also State v. Buccini*, 167 Ariz. 550, 556, 810 P.2d 178, 184 (1991) (adopting *Gates*). The totality-of-the-circumstances test for warrants has been described as a commonsense and practical consideration of the entire affidavit, including but not limited to an informant’s veracity and the basis of his or her knowledge, to determine whether there is “a fair probability that contraband or evidence of a crime will be found in a particular place.” *Gates*, 462 U.S. at 238. “[T]he duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” *Id.* at 238-39, *quoting Jones v. United States*, 362 U.S. 257, 271 (1960).

¶8 Here, the affidavit stated that the information Ramirez had provided officers concerning burglaries he was suspected of committing was consistent with information police had developed independently. It also contained a detailed account of the information Ramirez had provided the officers, including Leon's middle and last name, as well as the facts that Ramirez was able to identify the location of Leon's apartment and Leon's image from a photograph provided by officers and that the officers had verified Ramirez's claim that Leon lived in the apartment. The warrant also stated that Ramirez had used drugs with Leon in her apartment about a week before, that Leon was "usually in possession of a couple of ounces of methamphetamine at any given time," and that she purchased more drugs "several times a week."

¶9 Leon contends this information was not sufficiently detailed to support the finding of probable cause because the officers did not corroborate Ramirez's statements. But the totality-of-the-circumstances test articulated in *Gates* does not require further corroboration of an informant's statements. *See id.* Rather, *Gates* requires that the issuing magistrate consider "all the circumstances set forth in the affidavit before him" to ensure there is a sufficient probability that contraband will be found should the search warrant be granted and executed. *Id.* at 238. In any event, the officers here did corroborate Ramirez's statements about the burglaries and Leon's residence in the apartment complex.

¶10 Moreover, the affidavit supporting the warrant stated that Ramirez witnessed first-hand Leon using drugs in her apartment a week before the warrant was issued. And, as the state points out, "when an affidavit indicates that the informant was

an eyewitness to the actual crime [within a time period recent enough that any contraband would still be in the defendant's possession], . . . [the] reliability of the informant is . . . demonstrated,” and the “test for evaluating the existence of probable cause is met.” *State v. O'Brien*, 22 Ariz. App. 425, 426, 427, 528 P.2d 176, 177, 178 (1974) (citation omitted), *quoting State v. Robertson*, 22 Ariz. App. 220, 221, 526 P.2d 744, 745 (1974). Based upon the totality of the circumstances present here, we cannot say that Leon's warrant affidavit was lacking in probable cause. The trial court did not abuse its discretion in denying Leon's motion to suppress.

¶11 The case Leon cites in support of her argument does not require a different conclusion. In *State v. Williams*, 184 Ariz. 405, 407, 909 P.2d 472, 474 (App. 1995), this court held that a warrant affidavit did not provide probable cause for a search warrant because it did not satisfy the totality-of-the-circumstances test articulated in *Gates*. The court stated that the affidavit's “failures [we]re multiple,” including that the affidavit neglected to “establish the informant's reliability.” *Id.* The *Williams* court then concluded that “[a]n unreliable informant who lacks personal knowledge cannot provide probable cause.” *Id.* As we have explained above, however, Ramirez had personal knowledge of Leon's drug possession and use. Moreover, Ramirez's reliability was established by the fact that the officers had confirmed the burglary information and Leon's address and identification. The holding in *Williams* is therefore inapposite.

Disposition

¶12 Based on the foregoing, we conclude the trial court did not abuse its discretion in denying Leon's motion to suppress. We therefore affirm Leon's conviction and sentence.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge